Supreme Court, U.S.
FILED
MAY 8 - 2000
CLERK

(3)

No. 99-1555

In the

Supreme Court of the United States

JOYCE BICKERSTAFF,

Petitioner,

v.

VASSAR COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

This summary judgment in a discrimination case predicated on the race of the petitioner, a tenured associate professor at Vassar College where she was denied promotion to full professor, raises three intertwined issues of compelling importance to this Court.

First petitioner raises an issue pivotal in all summary judgment cases under Federal Rule 56 (c) as to the sufficiency of the evidence to warrant a denial of trial on the issues posed, an issue which this Court has often addressed to assure a litigant of her right to a trial by jury guaranteed her under Congress' amendment in 1991 of the Civil Rights Act as well as the Seventh Amendment See *Adickes v. Kress*, 398 U.S. 142, 158,159 (1970); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-50 (1986); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

Second, there is the specific issue of the sufficiency of evidence in a discrimination case under Title VII, where the plaintiff has alleged that the employer's asserted reason for the unfavorable employment decision is a pretext for discrimination -- an issue which has plagued the federal courts and which has the Circuit Courts of Appeal in confusion, particularly since this Court decided *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). *cf. Developments in Employment Discrimination,* 109 Harvard L. R. 1571, 1597 (May 1996).

Third, this case is about race and how a distinguished educational institution has managed to demonstrate its race prejudice against a faculty member it was pressured by student unrest twenty-five years ago to hire for the purpose of creating a program emphasizing black studies and in that connection promoted her to an associate professorship

with tenure. Thereafter, however, it demonstrated its race prejudice against her by refusing in due course to promote her to the full professorship she was qualified to receive. Material evidence by way of documents, affidavits and deposition testimony offered by petitioner in opposition to the motion for summary judgment was ignored, distorted and scanted by the appellate court, including proof that, at the time petitioner applied for promotion, Vassar had no African American full professors on its faculty.

As to the Second issue – the pretext petitioner charges Vassar with, based on the claim that her teaching did not meet Vassar's standards for promotion because her student evaluations were poor, petitioner produced evidence from the files of Vassar that other white faculty were promoted to full professorships with similar or lower student evaluations. (A. 292-93,300-01. 304.306.308,412.453-54, 713). Low student evaluations were cited by the district court as the sole ground for its ruling since that court found that the other criteria for promotion were so much "bafflegab" (54a). In so ruling the district court and the court below ignored contrary evidence by a distinguished professor, chairman of the Africana Studies Program and a decision-maker who had team-taught with petitioner, and who testified by affidavit from his experience teaching with her that petitioner was a highly effective, dedicated and innovative teacher who met Vassar's criteria for promotion. (A1129)

The Second Circuit decision below is replete with fact-findings favorable to Vassar on disputed factual issues; the court made fact-findings instead of identifying triable issues.

The court rejected expert regression analysis that established that all of the black faculty at Vassar, and particularly petitioner, was paid less than the white faculty by a statistically significant amount as proof of discrimination on the grounds that the evidence was not probative because it

omitted major variables. (22a) Although the court paid lip-service to *Bazemore v. Friday*, 478 U.S 385 (1986), it failed to recognize that a statistic which showed all African American faculty on a lower pay scale from the white faculty had a significance of its own.

Classic examples of blindness to the racial prejudice demonstrated by Vassar appear throughout the opinion of the court below. One example is noteworthy for its casuistry with respect to the evidence offered by petitioner to prove race was the real reason her promotion was rejected:

> Claiming that it was "carefully distinguish[ing] between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture," (19a) the court stated:
>
> "Bickerstaff next asserts that Professor Robin Trainor, the chair of the Education Committee that reviewed her for promotion, openly declared her racially prejudiced opposition to Bickerstaff prior to her 1994 candidacy for promotion. As evidence, she cites to the deposition testimony of Professor Perlstein, who testified, in pertinent part, that:
>
> At more than one department meeting when Miss Bickerstaff was there, [Trainor] said that it would be a crime if Miss Bickerstaff were made full professor and a disgrace...[Trainor] frequently said as well that Miss Bickerstaff contributed nothing to the department or the college.

> Perlstein also testified 'that matters of race were it seemed to me, relevant to her low opinion [of Bickerstaff]. '
>
> Even assuming that Trainor made the statements Perlstein attributed to her, *Perlstein's testimony provided no hint as to any racial reason for Trainor's opposition.* Attributing the reason to race would be based entirely on speculation, not logic. (Emphasis supplied) (29a)

Respondent's counterstatement of the facts rehashes and sets forth again the movant's evidence that petitioner was not, after 16 years as an associate professor at Vassar, qualified for promotion, stating that the Second Circuit's decision turned on "the factually focused question ' whether Bickerstaff has presented sufficient admissible evidence from which a rational finder of fact could infer' that she was a victim of discrimination." In Point II, however, it is clear that respondent has missed the thrust of petitioner's argument. The brief argues at page 11 that

> "The record in this case, however, will not present the Court with an opportunity to resolve that question [revisiting the standards of proof after *St. Mary's* with respect to the sufficiency of evidence required by the non-moving party for summary judgment] because there is no contention here that Vassar's stated reasons for rejecting petitioner's bid for a promotion were false."

Falsity of motive and the facts asserted by the respondent were the gravamen of petitioner's case in the district court and on appeal.

Even if, arguendo, the fact that petitioner had poor student teaching evaluations, would have been a non-discriminatory reason for denying her promotion, the direct evidence of racial discrimination she produced entitled her to consideration as a "mixed motive" case, an issue argued on appeal, but never addressed by the court below. See *Price Waterhouse v. Hopkins,* 490 U.S. 228, 270-77 (1989); Michael A. Subrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed- Motives Employment Law After Price Waterhouse v. Hopkins,*46 Stan. L. Rev, 959, 970-78 (1994)

Respondent fails to recognize that the entire thrust of the evidence produced below by petitioner was offered to prove that "Vassar's stated reasons for rejecting petitioner's bid for a promotion were false" and that the reliance on student evaluations as opposed to faculty observation of the teaching competence of the petitioner, the failure to consider other aspects of petitioner's teaching, the failure to follow the rules for ad hoc committee consideration, (creating two ad hoc committees for review instead of one as required by the Faculty Handbook) and the stated and recorded race - prejudiced remarks of the decision-makers , directed at petitioner, underlined the falsity of the respondent's position.

The district court and the Court of Appeals affirmance of the summary judgment order was based on accepting all of the moving party's fact contentions despite the nonmovant's challenge to those contentions by counter facts in the nature of direct evidence of racial prejudice in multiple incidents.

At page 11 of Vassar's Brief in opposition, respondent states that the court below was not presented with the issues argued here because "in each of the cases [urged by petitioner] where the courts ruled in favor of an employee,

the court found the existence of issues of fact regarding the falsity of the employer's statement of reasons for the challenged action." Accordingly avows respondent, "these courts," the ones cited by petitioner in his petition to this Court, "have been required to decide whether such evidence alone is always sufficient to defeat summary judgment."

This Court should note that *au contraire*, that is precisely what petitioner argued below and urges here.

What respondent has failed to understand, or guilefully would mislead this Court, is that evidence of discrimination as presented by petitioner necessarily rebuts Vassar's claim that it honestly rejected petitioner's application for promotion on judgment grounds applied equally to white faculty.

This claim of petitioner raises the pretext issue ---which is added to the prima facie case for discrimination found by the courts below. Has she shown pretext only, or pretext plus? Having presented such pretext evidence in opposing the motion for summary judgment, has petitioner met the standard this Court thought to establish in *St. Mary's*, or is something more required of petitioner before she is entitled to a trial to test the evidence she advanced in opposition to the motion for summary judgment?

CONCLUSION

For all the reasons stated in her petition and this brief, this Court should issue the Writ of Certiorari to review the judgment of the court below.

Respectfully submitted,

May 9, 2000

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